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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ADRIANUS CORNELIS KRUIK and WOLFGANG GAENG

Appeal 2009-003509
Application 10/820,880
Technology Center 1700

Decided: October 20, 2009

Before ADRIENE LEPIANE HANLON, CHUNG K. PAK, and
MARK NAGUMO, *Administrative Patent Judges*.

PAK, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's decision finally rejecting claims 1 and 6 through 21, the only claims pending in the above-identified application. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

STATEMENT OF THE CASE

The subject matter on appeal is directed to a process for manufacturing a composite frozen confection and a particular biscuit mass used in such process. (See Spec. 1 with claims 1 and 16.) Details of the appealed subject matter are recited in representative claims 1 and 16¹ reproduced from the Claims Appendix to the Appeal Brief (“App. Br.”), filed August 3, 2007:

1. A biscuit mass that has the appearance of a biscuit at a temperature of -10° C or below, but which is a liquid at a temperature of 15° C or above, and which keeps its biscuit consistency on storage at temperatures suitable for ice confections and upon subsequent consumption, comprising a mixture consisting essentially of particles of baked biscuit and at least one fat, wherein the fat is selected from the group consisting of partially hydrogenated vegetable oil, unmodified coconut fat, fractionated palm oil, partly fractionated milk fat and mixtures thereof, wherein the mixture contains 20 to 60% by weight of the biscuit particles and 40 to 80% by weight of the fat and wherein the fat has a solid fat content of about 95% at 10° C and about 0% at 25° C.

16. A process for manufacturing a composite frozen confection comprising a biscuit mass as a coating, core or inclusion and ice confectionery, which comprises reducing a biscuit or biscuit crumbs to a particulate form, admixing the resulting particles with a fat at a temperature of between 25° C and 35° C to form a homogeneous mass consisting

¹ Appellants have only argued the limitation of independent claims 1 and 16 (App. Br. 10-13). Therefore, for purposes of this appeal, we select independent claims 1 and 16 in deciding the propriety of the Examiner’s § 103 rejection. *See* 37 C.F.R. § 41.37(c)(1)(vii) (“When multiple claims subject to the same ground of rejection are argued as a group by appellant, the Board may select a single claim from the group of claims that are argued together to decide the appeal with respect to the group of claims as to the ground of rejection on the basis of the selected claim alone.”).

essentially of particles of baked biscuit and at least one fat, and bringing the ice confectionery and the biscuit mass into contact to form the composite confection.

The Examiner relies on the following evidence to establish unpatentability of the claims on appeal (Examiner's Answer ("Ans."), mailed November 14, 2007, at 2):

Hegadorn

CA 950750

Jul. 9, 1974

Appellants request review of the Examiner's rejection of claims 1 and 6 through 21 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of Hegadorn (App. Br. 8).

With respect to claims 1, 6 through 15, 20, and 21, the Examiner acknowledges that Hegadorn does not teach, *inter alia*, the claimed weight percentages of fat in its mixture containing pre-baked pastry crumbs and fat (Ans. 3). The Examiner finds that Hegadorn teaches the weight percentages of fat outside of those claimed (*id*). However, the Examiner concludes that "[i]t would have been obvious to vary the [prior art] fat content [to arrive at the claimed fat content,] when desiring to alter the taste, texture, [and] consistency of the mixture" (Ans. 4). Appellants disagree, contending that Hegadorn fails to disclose or suggest, among other things, "a biscuit-like mass comprising a mixture consisting essentially of particles of baked biscuit and 40 to 80% by weight of fat" (App. Br. 13).

With respect to claims 16 through 19, the Examiner finds that Hegadorn teaches mixing baked pastry particles corresponding to the claimed biscuit particles with fat at the claimed mixing temperature (Ans. 4). The Examiner finds that Hegadorn teaches forming a pie shell using the

resulting mixture (*id*). The Examiner also finds that “it is [sic, was] well known to place [a] frozen confection with [a] pie shell as discussed on line 4 of page 1 of the patent [i.e., Hegadorn]” (*id*). The Examiner then concludes that “[i]t would also have been obvious to combine a frozen confection with the [pie] shell disclosed in the patent [i.e., Hegadorn]” (*id*). Appellants disagree, contending (App. Br. 13) (emphasis original) that

Hegadorn also fails to disclose or suggest a process for manufacturing a composite frozen confection comprising bringing an ice confectionery and a biscuit mass consisting essentially of particles of baked biscuit and at least one fat into contact to form the composite confection as required, in part, by Claim 16.

ISSUES AND CONCLUSIONS

With respect to claims 1, 6 through 15, 20, and 21, the issue is: Have Appellants identified reversible error in the Examiner’s conclusion at page 4 of the Answer that “[i]t would have been obvious to vary the [prior art] fat content [to arrive at the claimed fat content] when desiring to alter the taste, texture, [and] consistency of the mixture” within the meaning of 35 U.S.C. § 103?

On this record, we answer this question in the affirmative.

With respect to claims 16 through 19, the issue is: Have Appellants identified reversible error in the Examiner’s determination that Hegadorn would have suggested a process for manufacturing a composite frozen confection via bringing an ice confectionery and a biscuit mass consisting essentially of particles of baked biscuit and at least one fat together within the meaning of 35 U.S.C. § 103(a)?

On this record, we answer this question in the negative.

FINDINGS OF FACT (“FF”)

1. Hegadorn teaches forming pre-baked pastry crumbs in the shape of flakes and granules by baking dough balls containing 45 to 70% flour, 0 to 4% salt, 20 to 50% shortening, and 5 to 25% water at about 400°F to 450°F and grinding the baked dough balls (p. 3, l. 5 to p. 4, l. 31).

2. Hegadorn teaches that the flour used in the dough balls can be “any of the common cereal flours, such as wheat, corn, rye and the like” (p. 3, ll. 12-18).

3. Hegadorn teaches employing a mixture containing 60 to 90% of pre-baked pastry crumbs, about 7 to 25% of fat, and 0 to 20% of binder to form a crumb composition which can be molded to form a crust covering the contour of any shape container such as a pie plate (form a pie shell) (p. 5, ll. 3-29 and p. 1, ll. 1-19).

4. Hegadorn teaches that “[t]he liquid fat suitable for use can be any of the commercially available and acceptably stable animal fats or hydrogenated vegetable oils” (p. 5, ll. 13-15).

5. Hegadorn exemplifies the pre-baked pastry crumbs at 40 °F being combined with the hydrogenated vegetable oil (p. 6, ll. 17-21).

6. Appellants do not dispute that Hegadorn teaches the pre-baked pastry crumbs and the hydrogenated vegetable oil (fat) being mixed at the claimed mixing temperature. (*Compare* Ans. 4 *with* App. Br. and Reply Br. in their entirety.)

7. Hegadorn teaches that the molded pre-baked crumb composition in the form of a pie shell is brought into contact with a frozen pie filling to form a dessert (p. 1, ll. 1-12).

PRINCIPLES OF LAW

The principles of law relied upon are set forth in the “ANALYSIS” section below.

ANALYSIS

ISSUE 1: CLAIMS 1, 6 THROUGH 15, 20, AND 21.

Appellants have correctly identified reversible error in the Examiner’s conclusion at page 4 of the Answer that “[i]t would have been obvious to vary the [prior art] fat content [to arrive at the claimed fat content] when desiring to alter the taste, texture, [and] consistency of the mixture.” As acknowledged by the Examiner at page 3 of the Answer, Hegadorn does not teach the claimed weight percentages of fat in its mixture. Rather, the Examiner agrees with Appellants that Hegadorn teaches a fat percentage range which is substantially outside of the claimed fat percentage range. Yet, the Examiner does not provide any factual evidence, other than a conclusion, to depart from the fat content taught by Hegadorn to arrive at the claimed fat content. As a predecessor to our reviewing court stated in *In re Sebek*, 465 F.2d 904, 907 (CCPA 1972):

[W]hile it may ordinarily be the case that the determination of optimum values for the parameters of a prior art process would be at least prima facie obvious, that conclusion depends upon what the prior art discloses with respect to those parameters. Where, as here, the prior art disclosure suggests the outer limits of the range of suitable values, and that the optimum resides

within that range, and where there are indications elsewhere that in fact the optimum should be sought within that range, the determination of optimum values outside that range may not be obvious.

Accordingly, we reverse the Examiner's decision rejecting claims 1, 6 through 15, 20, and 21 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of Hegadorn.

ISSUE 2: CLAIMS 16 THROUGH 19.

Claims 16 through 19 are on different footing. They, unlike claims 1, 6 through 15, 20, and 21, do not require any particular fat and biscuit percentages in their biscuit mass. Moreover, claim 16, by virtue of using the transitional term "comprising," does not preclude additional steps which are not recited. *In re Baxter*, 656 F.2d 679, 686 (CCPA 1981). As is apparent from dependent claim 19, such additional steps include molding the biscuit mass in the form of a pie shell prior to bringing it together with an ice confection.

Appellants do not argue that the claimed "biscuit" and "ice confection" are compositionally or structurally different from the baked pastry crumbs and frozen pie fillings taught by Hegadorn. Nor do Appellants dispute the Examiner's finding that Hegadorn teaches mixing the pre-baked pastry crumbs with fat at the claimed mixing temperature. Appellants only contend at page 13 of the Appeal Brief that Hegadorn fails to teach or suggest "a process for manufacturing a composite frozen confection comprising bringing an ice confectionery and a biscuit mass consisting essentially of particles of baked biscuit and at least one fat into contact to form the composite confection as required, in part by Claim 16."

However, the preponderance of evidence supports the Examiner's finding that Hegadorn teaches employing a mixture containing pre-baked pastry crumbs in the form of flakes and granules and fat to form a crumb composition which can be molded to form a crust covering the contour of any shape container such as a pie plate. According to Hegadorn, this molded pre-baked pastry crumb composition in the form of a pie shell can be brought into contact with a frozen pie filling corresponding to the claimed frozen or ice confectionery to form a dessert.

Thus, Appellants have not identified any reversible error in the Examiner's determination that Hegadorn would have suggested a process for manufacturing a dessert corresponding to the claimed composite frozen confection via bringing a pre-baked pastry composition containing baked pastry crumbs and fat corresponding to the claimed biscuit mass in the form of a pie shell and a frozen pie filling corresponding to the claimed ice or frozen confectionery together as required by claims 16 through 19 within the meaning of 35 U.S.C. § 103(a). Accordingly, we affirm the Examiner's decision rejecting claims 16 through 19 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of Hegadorn.

ORDER

In view of the foregoing, we affirm the Examiner's decision rejecting claims 16 through 19 under 35 U.S.C. § 103(a), but reverse the Examiner's decision rejecting claims 1, 6 through 15, 20, and 21 under 35 U.S.C. § 103.

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. §1.136(a)(1)(iv).

AFFIRMED-IN-PART

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